

Tentative Minute Order re Motions in Limine

Plaintiffs Schuyler Lifschultz *et al.* (collectively “Plaintiffs”) and the City of San Juan Capistrano *et al.* (collectively “City”) move the Court for relief by way of Motions *in Limine*. The Court now enters its rulings.

I. Plaintiffs’ Motions in Limine.

A. Motion in Limine No. 1: Certain Prior Rulings.

Plaintiffs seek to bar the City from challenging or otherwise attempting to offer evidence which contradicts those rulings. (Docket No. 101.) The City has filed an opposition. (Docket No. 112.) The City’s Motion *in Limine* No. 2 largely parallels some of the same issues. (City Motion No. 2, Docket No. 86; Opposition, Docket No. 113.) The Court considers both matters together.

Criminal Finding of Innocence. The City caused to be initiated a misdemeanor criminal prosecution against Lifshcultz for dragging a dumpster across the street in front of his business premise. People of the State of California v. Lifschultz, Case No. 17HF1276. The District Attorney later dismissed the case. Lifschultz moved for and received a Finding of Factual Innocense pursuant to Penal Code §§ 851.8/851.

ARGUE.

Code Violations. The City initiated a civil administrative proceeding for alleged code violations concerning tree cutting. An appeal ended the prosecution in favor of Lifschultz. The Superior Court reversed and set aside the code violations and associated fine. Lifschultz v. San Juan Capistrano Code Enforcement Case, Superior Court of California, County of Orange, Case No. 30-2017-00958536-CL-JR-CJC, Minute Order.

The Court finds that the Code Violation reversal (“Reversal”) is admissible and binding on the City as a matter of collateral estoppel. McGowan v. City of San Diego, 208 Cal.App. 3d 890, 895 (1962). The relationship of co-

defendants, J.R. Torrez and Alejandra Molina with the City binds than as well to this ruling. Boeken v. Philip Morris USA, Inc., 48 Cal.App. 4th 788, 797 (2010).

The Court acknowledges that the Code Reversal does not negate any element of the malicious prosecution claim, but it does establish a favorable determination which is one of the elements of a malicious prosecution claim. The City may not contradict the decision.

The Court does not regard the Motion as a “stealth” summary judgment motion. (See Opposition, p. 1.) Rather it goes to the exclusion of impermissible evidence.

The Court grants this portion of the Motion.

B. Motion in Limine No. 2: Evidence of Drug Use at Calle Perfecto Property.

Plaintiffs seek an order to exclude white butcher paper seized at the Calle Perfecto property as part of a criminal search and speculation concerning the use of drugs at the site. (Docket No. 102.)

The Motions is unopposed, and on that basis is granted. (Local Rule, 7-12.) Moreover, such evidence would appear to be irrelevant to the issues in this case and more prejudicial than probative. (Fed. R. Evid. 402, 403.)

C. Motion in Limine No. 3: Exclusion of Certain Expert Testimony, or in the Alternative Grant of Relief to Reply.

Plaintiffs’ seeks an order to exclude expert testimony for failure to make the required expert disclosures under Federal Rule of Civil Procedure 26(a). (Docket No. 103.) The City has filed an opposition. (Docket No. 111.)

1. Legal Standards.

Rule 26(a) sets forth scope of required expert disclosures

Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the

witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(Fed. R. Civ. P. 26(a)(2)(B)(emphasis supplied).

Rule 37(c)(1) of the Federal Rules of Civil Procedure establishes a self-executing sanction for failing to make required disclosures: “If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1); Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-06 (9th Cir. 2001). The Rule also provides for alternate sanctions:

In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(Id.)

2. Discussion.

The City has identified Paul Armstrong, Stanley Kephart and/or Deborah Dicks as experts it intends to call at trial. (Docket No. 103-2, Ex. 1) The disclosure provides virtually none of the data required by Rule 26(a)(B). Most critically, none of the expert has presented a report. The experts are excluded. (Fed. R. Civ. P. 37(c)(1).

The City fails even mention the report requirement in its opposition. The failure to make full timely disclosures is neither harmless nor excusable. The offer to make the experts available just weeks before trial is no cure for the City's default. As the City acknowledges, the failure to provide a report "undermines the opposing party's ability to meaningfully depose or cross examination the expert." (See Opposition, p. 6.)

Although not directly raised by the Motion, the Court also excludes Karen Lasser. The designation is untimely and the content of her report indicates that it is fact an initial report which should have been disclosed long ago.

II. City's Motions in Limine.

A. Motion in Limine No. 1: Certain Video Evidence.

The City seeks an order admitting certain video evidence. (Docket No. 85.) Liftscultz has filed an opposition. (Docket No. 112.)

The videos in issue purport to be taken from a closed circuit television system on the day of the criminal incident in this case. The City offers a chain of custody report which documents the location of the videos from the time of removal to the present. (Motion, Ex. B.) The City also offers a custodian of records declaration for purposes of the business records exception (Fed. R. Evid 802(6)). (Motion, Ex C.) The Rosa Police Report dated August 2, 1917 stated that the video does not show “a clear picture of the person driving the forklift.” (Docket No. 85-3, p. 9; pagination per ECM.)

The City states that the videos were “personally reviewed by Sergeant Mike Padilla,” and used in his investigation. (Motion, 7.) The City asserts:

A review of the video recordings displays the truth, and the foundation allowed to authenticate video recordings is simply testimony by a witness with knowledge that the photo, videotape or motion picture accurately represents the scene or activity depicted.

(Motion, p. 7.) However, neither Padilla nor anyone else states that the video accurately captured the events depicted.

Videos are not self-authenticating. Asociacion De Periodistas De Puerto Rico v. Mueller, 60 F.3d, 79-80 (1st Cir. 2012). The City has not met its burden under Rule 901(a) of the Federal Rules of Evidence to show that the videos accurately captured the events depicted. (Id.)

The Motion is denied.

B. Motion in Limine No. 2: Exclusion of Finding of Factual Innocence.

See above.

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Counsel are ordered to advise the parties and all witnesses of the Court's rulings so that there are no inadvertent violations of this Order.